

RENDERED: June 25, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001753-MR

ROBERT L. MADISON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-00297

COMMONWEALTH OF KENTUCKY,
PUBLIC SERVICE COMMISSION;
LOUISVILLE GAS AND ELECTRIC COMPANY;
KENTUCKY INDUSTRIAL UTILITY COMMISSION;
and ATTORNEY GENERAL OF KENTUCKY

APPELLEES

OPINION

AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; DYCHE, JUDGE AND EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE. The sole issue presented is whether a complaint filed without directing the issuance and service of a summons is sufficient to commence an action against the Public Service Commission. We agree with the circuit court that it is not and affirm the order dismissing the action.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On February 11, 2002, the Commission issued an order regarding an environmental surcharge for the Louisville Gas and Electric Company. KRS² 278.410 provides for a right of appeal by "bring[ing] an action against the Commission in the Franklin Circuit Court to vacate or set aside the order. . . ." On March 11, 2003, Robert L. Madison filed his complaint attempting to appeal the Commission's order and mailed copies of the complaint to the Public Service Commission.

When a statute creates a right of appeal of an administrative order, the appealing party must strictly comply with the statutory procedures.³ KRS 278.410(1) provides:

Any party to a commission proceeding or any utility affected by an order of the Commission may, within thirty (30) days after service of the order, or within twenty (20) days after its application for rehearing has been denied by failure of the commission to act, or within twenty (20) days after service of the final order on rehearing, when a rehearing has been granted, bring an action against the Commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. Service of a commission order is complete three (3) days after the date the order is mailed. Notice of the institution of such action shall be given to all parties of record before the commission.

² Kentucky Revised Statutes.

³ Bd. of Adjustment of the City of Richmond v. Flood, Ky., 581 S.W.2d 1, 2 (1979).

The statute unambiguously requires that an action be commenced in the Franklin Circuit Court within thirty days after service of the order. CR⁴ 3 provides that a civil action is commenced upon the filing of a complaint with the court and the issuance of a summons. As stated in Commonwealth of Kentucky, Transportation Cabinet, Department of Highways v. City of Campbellsville, Kentucky,⁵ the appeal of an administrative order requires the issuance of summons in good faith:

Under our system, civil actions are commenced by (1) the filing of a complaint (petition), and (2) the issuance of summons (or warning order) in good faith. KRS 413.250 and Kentucky Rules of Civil Procedure (CR) 3. Service upon 'the Commonwealth or any agency thereof' is had by serving the attorney general or any assistant attorney general. CR 4.04(6). CR 4.01 directs the clerk to forthwith issue summons upon the filing of a complaint, at the direction of the initiating party.

It is the exclusive method by which an order of the Commission can be reviewed and the requirements are jurisdictional.⁶ Lack of subject matter jurisdiction can be raised at any time and does not need to be raised in the answer to the complaint.⁷

⁴ Kentucky Rules of Civil Procedure.

⁵ Ky., 740 S.W.2d 162 (1987).

⁶ Kentucky Utilities Company v. Farmers RECC, Ky., 361 S.W.2d 300, 301 (1962).

⁷ Privett v. Clendenin, Ky., 52 S.W.3d 530, 532 (2001).

In this case, Madison did not direct the clerk to issue and have served a summons on the Public Service Commission; nor did he pay the required fee for service of a summons.

Having, thus, failed to comply with requirements of the statute, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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